



Office of the Attorney General  
State of Texas

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ATTORNEY GENERAL

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Mr. Ryan Tredway  
Staff Attorney  
Texas Department of Insurance  
Legal and Compliance Division  
P.O. Box 149104  
Austin, Texas 78714-9104

OR98-1232

Dear Mr. Tredway:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 115039.

The Texas Department of Insurance (the "department") received a request for information regarding Prudential Health Care ("Prudential"). You state that some of the requested information will be released. However, you assert that the privacy or property interests of Prudential may be implicated by the release of the remaining requested information. Therefore, you raise section 552.305 of the Government Code on behalf of Prudential.

Pursuant to section 552.305 of the Government Code, this office notified Prudential of the request. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). Prudential responded to the notice, asserting that the requested records are excepted from required public disclosure based on sections 552.101 and 552.110 of the Government Code. You have submitted to this office a one-page document, entitled "Action Plan," and two pages of a department staff member's notes which you claim are responsive to this request. We have reviewed the claimed exceptions and the submitted documents.

Prudential raises section 552.101 of the Government Code<sup>1</sup> in conjunction with article 20A.17(b)(4) of the Insurance Code, which states:

The Commissioner may examine and use the records of a health maintenance organization, including records of a quality of care assurance program and records of a medical peer review committee . . . as necessary to carry out the purposes of this Act, including an enforcement action under Section 20 of this Act. That information is confidential and privileged and is not subject to the open records law, Chapter 552, Government Code, or to subpoena except as necessary for the commissioner to enforce this Act.

Having reviewed the arguments and the information at issue, we determine that the submitted records are not the type of records of a health maintenance organization made confidential under article 20A.17(b)(4). Therefore, the documents at issue are not confidential under article 20A.17(b)(4).

Also in conjunction with section 552.101, Prudential argues that the records at issue may be protected from public disclosure by judicial decision. However, Prudential cites no case law in support of its position that the submitted information is deemed confidential by judicial decision. Therefore, we conclude that the department may not withhold the requested information under section 552.101.

Prudential also asserts that section 552.110 of the Government Code excepts the report from public disclosure. Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information

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<sup>1</sup>Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), cert. denied, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the “trade secrets” branch of section 552.110 to requested information, we accept a private person’s claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.<sup>2</sup>

In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts’ interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. In *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government’s ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. *Id.*

After reviewing Prudential’s arguments and the information it seeks to withhold, we conclude that neither the Action Plan nor the department staff member’s notes is

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<sup>2</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: “(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company’s] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.” RESTATEMENT OF TORTS, § 757 cmt. b (1939); see also Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

information excepted from public disclosure under section 552.110. The department must therefore release these records to the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Vickie Prehoditch  
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Open Records Division

VDP/gle

Ref.: ID# 115039

Enclosures: Submitted documents

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